



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

June 21, 2022

Hon. Emory A. Rounds
Director
U.S. Office of Government Ethics
1201 New York Avenue, NY, Suite 500
Washington, DC 20005

Re: Comment of Citizens for Responsibility and Ethics in Washington in response to *Proposed Rules: Legal Expense Fund Regulation*, U.S. Office of Government Ethics, RIN 3209-AA50, 87 Fed. Reg. 23769 (April 21, 2022)

Dear Director Rounds,

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully submits this comment in response to the proposed rules that the U.S. Office of Government Ethics (“OGE”) issued on April 21, 2022, regarding legal expense fund regulations.¹ CREW submitted an initial comment on May 15, 2019, in response to the advance notice of proposed rulemaking and notice of public hearing on the legal expense fund regulation that OGE issued on April 15, 2019. CREW is pleased that many of the proposals we recommended have been adopted in the OGE proposed rule. CREW commends OGE for addressing this issue, which has remained outstanding for far too long. These regulations are necessary, not only to protect the integrity of our government, but also to ensure that public officials are not compelled to respond to an investigation in a specific manner based on their source of funding.

CREW is particularly pleased with OGE’s commitment to requiring a trust as the mandated structure for legal expense funds.² As detailed in our previous comment, the Patriot Fund’s structure as an LLC enabled the operators to exert improper influence over government

¹ CREW gratefully acknowledges the work of our law clerk Isabel Gutenplan whose contributions and assistance were invaluable in writing this letter.

² *Legal Expense Fund Regulation*, U.S. Office of Government Ethics, RIN 3209-AA50, 87 Fed. Reg. 23769, 23771 (proposed April 21, 2022).

officials and shrouded the donation sources in secrecy.³ OGE's explicit rejection of LLCs, partnerships, and other structures under the rules proposed in subpart J is a major step forward in returning the government to the ethical norms that preceded the Trump administration.⁴

CREW believes that the proposed trust framework in subpart J should be the exclusive means for accepting legal expense fund payments. For this reason, CREW opposes the possible use of alternative authorities, specifically gift exclusions or exceptions currently contained in subpart B, as a basis for accepting payments from other types of legal expense funds (e.g. LLCs or partnerships) that would not meet the criteria contained in proposed subpart J.⁵

Further, CREW commends OGE's careful consideration of anonymous whistleblowers and the particular risks they face within the proposed structure.⁶ CREW is also pleased with OGE's consideration of penalties for noncompliance with reporting requirements.⁷ This will greatly increase the transparency of legal expense funds, and provide important incentives for trustees and beneficiaries to comply with the regulations.

This comment serves to highlight areas of the proposed rules that 1) CREW agrees with and does not wish to change, 2) can be improved, and 3) OGE has specifically requested additional comments to address.

I. Mandatory structure as a trust with one beneficiary

As stated above, CREW is pleased that OGE has mandated a trust structure for all legal expense funds.⁸ This was CREW's most important recommendation in its previous comment, because, as OGE is aware, the fiduciary duty owed by a trustee to a beneficiary is critical in preventing fund operators from exerting improper influence on employee beneficiaries.⁹ The Patriot Fund's structure as an LLC was an ill-advised break from past practice, and CREW commends OGE for formalizing the previous norm of trust-structured legal expense funds into these proposed regulations.

³ Letter from Noah Bookbinder to OGE Director Emory A. Rounds, July 15, 2019, at 15-16, <https://www.citizensforethics.org/wp-content/uploads/legacy/2019/05/CREW-Comment-on-OGE-RIN-3209%E2%80%9393AA50-May-15-2019.pdf>.

⁴ *Legal Expense Fund Regulation*, 87 Fed. Reg. at 23771.

⁵ *Id.* at 23772.

⁶ *Id.* at 23771.

⁷ *Id.* at 23772.

⁸ *Id.* at 23771.

⁹ Letter from Bookbinder to Rounds.

As noted above, CREW believes that the proposed trust framework in subpart J should be the exclusive means for accepting legal expense fund payments, and urges OGE to clearly reject alternative authorities, specifically subpart B's current gift exclusions or exceptions, as a basis to accept payments from any legal expense funds that are structured as LLCs or partnerships. Acceptance of legal expense fund payments from LLCs, partnerships and similar non-trust entities based on exceptions or exclusions in subpart B would appear to be authorized by § 2635.1002(b)(2). If permitted, this would undermine the efficacy of the proposed subpart J and defeat the purpose of requiring a trust framework.

CREW notes that OGE has also tentatively accepted its initial recommendation that each legal expense fund only have one beneficiary, but is soliciting further comments to finalize this proposal.¹⁰ CREW strongly recommends maintaining the tentative proposed rule requiring that each fund have only **one** beneficiary. Multiple beneficiaries could cause competition among the beneficiaries, and employees could feel pressure to testify, or refrain from testifying, on certain matters in order to receive legal expense fund payments. The potential for conflicts of interest between multiple beneficiaries severely weakens and complicates the fiduciary duty owed by a trustee to the beneficiary.

II. Trustee eligibility

CREW is pleased that OGE is formalizing the list of individuals who are prohibited from serving as a trustee for legal expense funds.¹¹ There are a few missing categories, however, the inclusion of which would significantly reduce the possibility of conflicts of interests between the trustee and the beneficiary. In addition to OGE's proposed criteria, CREW recommends that OGE prohibit the trustee position from being held by—

- a. A prohibited source for the sole beneficiary;
- b. Employees of lobbyists, even if that employee is not a registered lobbyist themselves;
- c. All relatives of the employee beneficiary;
- d. An employee or agent of the beneficiary or any other person prohibited by this section.

CREW notes that OGE proposes that the trustee cannot be a person who has interests substantially affected by the performance or nonperformance of the employee beneficiary's official duties.¹² This only encompasses one of the five criteria listed in OGE's gift rule

¹⁰ *Id.*

¹¹ 87 Fed. Reg. at 23771, 23777.

¹² *Id.*

definition of “prohibited source,” at § 2635.203(d).¹³ CREW recommends OGE adopt a broader definition of “prohibited source.” If OGE maintains the proposed legal expense structure, which makes *pro bono* legal services and legal expense funds exceptions to the gift rules, OGE should include the “prohibited source” definition that applies under the gift rules, which would include any person seeking official action by the employee’s agency; does business or seeks to do business with the employee’s agency; conducts activities regulated by the employee’s agency; or has interests that may be substantially affected by the performance or nonperformance of this employee’s official duties.¹⁴ This change will help prevent conflicts of interest and ensure that the rule does not create loopholes that could lead to unintended consequences, including abuse of legal expense funds as a way to exert influence over the employee beneficiary.

Further, CREW recognizes that in the notes to § 2635.1002(b), OGE states that an employee beneficiary will be treated as having a covered relationship with a legal expense fund’s trustee and donors within the meaning of § 2635.502(b)(1) for one year.¹⁵ While OGE explains when the one-year period of disqualification begins to run for donors and *pro bono* legal service providers, it is not clear when the one-year period begins to run for the trustee.¹⁶ CREW recommends that the trustee have a covered relationship with the employee beneficiary *at least* for the duration of the legal expense fund’s existence and for four years following the termination of the legal expense fund.

In addition to the covered relationship for the duration of the legal expense fund, CREW recommends that the trustee have a recusal obligation from any “particular matters,” which exists throughout the life of the legal expense fund and for four years following the termination of the legal expense fund. Specifically, this recusal obligation would prohibit the employee from participating personally and substantially in any particular matter that the employee knows will directly and predictably affect the financial interests of the trustee, the trustee’s employer, spouse or minor child, or any company in which the trustee holds at least a 10% ownership stake. This includes matters of both specific and general applicability.

III. Legal expense fund authorization

¹³ 5 C.F.R. § 2635.203(d) (2017) (“Prohibited source” means “any person who: (1) is seeking official action by the employee’s agency; (2) does business or seeks to do business with the employee’s agency; (3) conducts activities regulated by the employee’s agency; (4) has interests that may be substantially affected by the performance or nonperformance of the employee’s official duties or (5) an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section.”)

¹⁴ But, it would not seem appropriate to include paragraph (d)(5) of § 2635.203(d), which covers an organization the majority of whose members is comprised of prohibited sources listed in paragraphs (d)(1) through (4), since this particular paragraph refers mostly to trade associations and similar organizations, which are unlikely to qualify as trustees.

¹⁵ *Legal Expense Fund Regulation*, 87 Fed. Reg. at 23776.

¹⁶ *Id.*

CREW is pleased with the authorization mechanism that OGE has set out for legal expense funds, including that all legal expense funds and amendments must have approval by the Designated Agency Ethics Official (DAEO), with a secondary OGE review in many cases, before contributions can be accepted.¹⁷ CREW commends OGE's commitment to oversight and transparency. To further advance this goal, and to protect against undue influence on the part of legal expense funds operating in a prohibited structure, CREW recommends mandating that the following documents be included in the reports sent to these reviewing officials for approval:

- a. The trust agreement;
- b. All side or supplemental agreements, if applicable;
- c. Written procedures for compliance with applicable ethics requirements;
- d. A certification that the trustee meets the eligibility requirements, which must include the trustee's
 - i. Name
 - ii. Business address
 - iii. Employer
 - iv. Description of relationship with employee beneficiary
- e. No redactions of the documents other than, if applicable, any fee schedule, the personal address or contact information of any person, the name of any minor child, and any account number.

IV. Prohibited donors

CREW largely approves of the prohibitions on donor eligibility, including organizations with limited exceptions for a national committee of a political party or campaign donations in the case of former members of a campaign of a candidate for President or Vice President.¹⁸ OGE also requested additional comments on expanding the exception to certain nonprofit organizations.¹⁹ CREW strongly recommends against expanding these exceptions to allow IRS Code §§ 501(c)(3) and/or 501(c)(4) groups to contribute to legal expense funds. While CREW recognizes that OGE needs to include the aforementioned limited exceptions, 501(c)(3) and 501(c)(4) organizations would undermine OGE's commitment to transparency, as the sources of an organization's funding will likely be unknown to an employee and ethics officials. It would become increasingly difficult to prevent prohibited donors from using an organization to conceal their identity. Further, if given the option, individuals are incentivized to donate to a 501(c)(3) as opposed to directly to the legal expense fund because they would receive a tax deduction on their donation. This would distort the purpose of the legal expense fund and further inhibit the transparency OGE is seeking.

¹⁷ *Id.* at 23771.

¹⁸ *Id.* at 23772.

¹⁹ *Id.*

However, CREW acknowledges that whistleblowers are often more vulnerable and require greater protections than other government employees. For this reason, CREW supports a limited exception that would allow whistleblower legal expense funds to accept payments from a 501(c)(3) organization that the trustee verifies has been in existence for at least three years and has an established history of promoting government integrity, whistleblower protection, federal employment policies, or accountability for fraud waste and abuse in the government.

CREW would add one additional category to the donor prohibitions. CREW recommends that state or local governments and any employee or agent of a state or local government be prohibited from donating to the legal expense fund *if* the employee beneficiary is involved in matters that could substantially affect state or local government business.

V. Donor screening

CREW recognizes that the notes of the proposed rules state that the trustee will screen donations to ensure the donations come from a permissible source.²⁰ CREW approves of this development, and agrees that the trustee should be responsible for ensuring that the donation pool is not tainted with prohibited donations. It is unclear, however, what is required of the trustee in this screening process. To reiterate our recommendations for donor screenings from CREW's May 15, 2019, comment,²¹ we recommend that OGE require that the trustee conduct the following screening of each donor:

- a. The trustee must collect signed and dated statements from all donors, which the trustee will file *on their behalf* with the beneficiary's employing agency or office, containing the following information:
 - i. Name;
 - ii. Employer;
 - iii. Primary state of legal residence or employment;
 - iv. Confirmation that the donor meets the eligibility requirements in § 2635.1006; and
 - v. An explicit acknowledgment that the donor is aware that the document is being submitted to the United States government and of the applicability of the prohibition against false statements in 18 U.S.C. § 1001²²
- b. The trustee must review the materials submitted by each donor and conduct reasonable due diligence, including consultation with the sole beneficiary and

²⁰ *Id.* at 23774.

²¹ Letter from Bookbinder to Rounds, at 7-8.

²² This requirement will create greater incentive for donors to make complete and accurate certifications.

DAEO for the employing agency or office, to ensure that the donor is not a prohibited source; and

- c. In the case of any donor contributing an aggregate of more than \$1,000 throughout the life of the legal expense fund, the trustee must interview the donor to confirm that the donor meets the eligibility criteria in § 2635.1006.

CREW supports the proposed rule stating that if an improper donation is discovered the beneficiary and trustee must return the donation as soon as practicable but no later than the next reporting due date.²³ This rule will work along with the above stated screening criteria to ensure that the donations do not come from a prohibited source and pose a conflict of interest for the employee beneficiary.

VI. *Disclosures and quarterly reports*

CREW was very encouraged by the proposed quarterly reporting requirements in § 2635.1007.²⁴ Both the quarterly reports and the penalty for noncompliance will significantly improve the transparency and oversight of the legal expense funds.²⁵ To strengthen these requirements, CREW recommends mandating that in each quarterly report the trustee either disclose violations of the legal expense fund regulations, including any corrective action taken, or affirmatively declare that there have been no known violations. This will incentivize trustees to conduct thorough screenings of donors and promptly return any donations later found to be impermissible, despite the screening conducted.

VII. *Recusal or cap on donations*

As discussed in “Trustee eligibility,” CREW acknowledges that in the notes to § 2635.1002(b), OGE contemplates that the employee beneficiary would have a covered relationship for one year with a legal expense fund’s trustee, donors, and *pro bono* legal service providers, within the meaning of § 2635.502(b)(1).²⁶ The proposed rules also include a cap of \$10,000 per year for any single permissible donor.²⁷ While CREW agrees that a donation cap and a recusal limit can work in concert, we are concerned that a standardized time period could cause impartiality concerns with regards to donors that contribute significant funds to the legal expense fund.

²³ *Legal Expense Fund Regulation*, 87 Fed. Reg. at 23772, 23779, 23780.

²⁴ *Id.* at 23772, 23779, 23780.

²⁵ *Id.*

²⁶ *Id.* at 23776.

²⁷ *Id.* at 23772, 23778.

CREW initially recommended that the regulation institute either 1) a \$5,000 donation cap for each donor for the life of the legal expense fund, or 2) a four-year recusal obligation as to “particular matter” with respect to any source whose aggregate donations to the legal expense fund exceed \$5,000. Specifically, this recusal obligation would prohibit the employee from participating personally and substantially in any particular matter that the employee knows will directly and predictably affect the financial interests of the donor, the donor’s employer, spouse or minor child, or any company in which the donor holds at least a 10% ownership stake.

To account for both CREW and OGE’s proposals on the matter, CREW recommends instituting different lengths of time for covered relationships depending on the amount of money donated, as a \$250 donation will have a significantly different impact on an employee than a \$5,000 or \$10,000 donation. CREW also recommends that OGE modify the timeframe applicable to the proposed \$10,000 cap in the following manner:

- a. An aggregate cap of \$10,000 for each donor for the life of the legal expense fund for funds for all employee beneficiaries; and
- b. For all donors with an aggregate donation of less than \$5,000 to a single legal expense fund, the employee beneficiary will have a one-year covered relationship within the meaning of § 2635.502(b)(1) with a mandatory recusal obligation for any “particular matter,” as defined above; and
- c. For all donors with an aggregate donation of \$5,000 or more to a single legal expense fund, the employee beneficiary will have a four-year covered relationship within the meaning of § 2635.502(b)(1) with a mandatory recusal obligation for any “particular matter,” as defined above.

As OGE contemplates in the notes to § 2635.1002(b), the one-year period of disqualification for each donor begins to run on the most recent date a legal expense fund donation is received from the donor.²⁸ The four-year period, similarly, would be triggered at the first donation that brings the aggregate donation total to \$5,000 or more, and would reset with each subsequent donation.

VIII. Unused funds

In general, CREW is encouraged by the proposed rules regarding the distribution of unused funds following the termination of the legal expense fund. OGE has proposed that the 501(c)(3) cannot 1) be one established by the beneficiary, 2) be an organization with which the beneficiary has a covered relationship, or 3) have the beneficiary or the beneficiary’s spouse or

²⁸ See *id.* at 23776.

child as an officer, director, or employee.²⁹ CREW agrees with these limitations, and recommends adding that the 501(c)(3) receiving the donations should have no affiliation with the trustee.

Further, CREW notes that OGE requested additional comments regarding if the nonprofit receiving funds should be named at the formation of the trust or if the selection should be left to the discretion of the trustee.³⁰ CREW recommends maintaining the tentative rule that the trustee retain sole discretion in selecting the nonprofit, provided that the trustee may not have any affiliation with the organization, as recommended above. This accounts for the long length of time in which legal expense funds can exist and the fact that the status of nonprofit organizations, and importantly, the relationships between trustee, beneficiary, and donors to various nonprofits, can change over time.

IX. Public disclosure

CREW is encouraged by the proposed rules regarding public disclosure of trust documents and quarterly reports and recommends OGE accept them as final.³¹

X. Pro Bono Legal Services

CREW supports the proposed bar on accepting *pro bono* legal services from lobbyists, foreign governments or foreign agents,³² but otherwise believes the current gift rules are adequate to address conflicts of interest that arise from the receipt of *pro bono* legal services. However, if OGE chooses to maintain the proposed structure, which makes *pro bono* legal services and legal expense funds additional exceptions to the gift rules, OGE should incorporate OGE's broad definition of prohibited source under § 2635.203(d),³³ rather than limit it, as proposed, to a "person who does not have interests that may be substantially affected by the performance or nonperformance of an employee's official duties."³⁴

OGE is soliciting comments on whether employees may accept legal services at a reduced cost or free of charge when the legal services are paid for by a nonprofit organization, such as a 501(c)(3) or 501(c)(4), but the services are provided by attorneys outside of that organization.³⁵ CREW believes that the use of 501(c)(3) and (4) organizations as the source of

²⁹ *Id.* at 23773.

³⁰ *Id.*

³¹ *Id.* at 23778, 23779.

³² *Id.* at 23773.

³³ 5 C.F.R. § 2635.203(d)(1)-(5).

³⁴ 5 C.F.R. § 2635.203(d)(4).

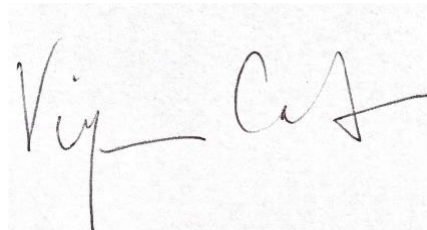
³⁵ 87 Fed. Reg. at 23771, 23773.

funding to support *pro bono* legal services would undermine OGE's commitment to transparency since the source of that funding will likely be unknown to the employee and ethics officials. As noted above, CREW recognizes that whistleblowers are often more vulnerable and need greater protections than other government employees. For this reason, CREW would support the acceptance of *pro bono* legal services from a 501(c)(3) organization that the trustee verifies has been in existence for at least three years and has an established history of providing legal services in support of government integrity, whistleblower protection, federal employment policies, or accountability for fraud waste and abuse in the government.

CREW notes that compliance questions arose when President Donald J. Trump failed to disclose the value of *pro bono* legal services he received from his attorney Rudy Giuliani on his public financial disclosure report.³⁶ For this reason, CREW recommends that OGE require covered officials and employees to certify in writing that they have notified their attorney of their financial disclosure reporting obligations, if any, and their attorney has agreed to provide them with the value of services provided each year so that they may meet their gift reporting requirements.

In conclusion, CREW thanks you for your leadership on this important issue and for your commitment to transparency, openness, and accessibility. CREW commends you and your staff for your efforts to develop a manageable rule governing legal expense funds and *pro bono* legal services that recognizes the particular needs of anonymous whistleblowers and public servants with limited resources who may find themselves in the unfortunate position of requiring legal representation related to their official position, or their prior employment on a campaign or presidential transition, while necessarily incorporating strong ethical safeguards to prevent possible abuses.

Sincerely,

A handwritten signature in black ink, appearing to read "Vig Canter", is centered on the page. The signature is written in a cursive, flowing style.

Virginia Canter
Chief Ethics Counsel

³⁶ See e.g., Jim Dwyer and Eric Lipton, [A Great Big Gift Not on Trump's Disclosure Form: Giuliani's Legal Advice](https://www.nytimes.com/2019/12/13/us/politics/giuliani-trump-financial-disclosure.html), *New York Times*, Dec. 13, 2019, <https://www.nytimes.com/2019/12/13/us/politics/giuliani-trump-financial-disclosure.html>.